

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

B
P/S
74-2249

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

HUMBERTO FLORES,

Appellant.

Docket No. 74-2249

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

WILLIAM EPSTEIN,
Of Counsel



PAGINATION AS IN ORIGINAL COPY

000711Z

Did import drugs into the U.S.

Fine,	2-8-74	Notice of Appeal
Clerk,		(deft Flores(no fee
Marshal,		
Attorney,		
Commissioner's Court,		
Witnesses,		

6/19/73	Before JUDD, J.- Indictment filed and Bench Warrants ordered and issued.
8-28-73	Notice of Appearance filed for deft FLORES.
8-28-73	Before COSTANTINO J - Case called - Deft FLORES & counsel present; deft arraigned and enters a plea of not guilty - trial set down for 9-17-73 at 10:00 am. Bail set at \$75,000.00 - deft in custody.
9/29/73	Bench Warrant ret'd and filed. Executed. (FLORES, H.)
10/25/73	Notice of Readiness for Trial filed.
8-3-73	Before COSTANTINO J - Case called - Deft & counsel Mrs. Rosner present - Interpreter present. Motion withdrawn for reduction of bail argued and adj'd to 8-6-73. (FLORES)
10/6/73	Before, COSTANTINO, J.- Case called- Deft and atty Mrs. Rosner with interpreter present. Motion argued- Bail reduced to \$50,000.00 Cash Bond
	Def. FLORES

DATE	PROCEEDINGS
9/4/73	Before COSTANTINO, J. - Case called - Deft present - Court to appoint counsel - Court appoints Nancy Rosner as counsel (FLORES)
9-4-73	By Costantino J - Memorandum and Order filed leave to proceed in forma pauperis is granted (Humberto Flores)
9-17-73	Before COSTANTINO J - Case called - deft Humberto Flores with counsel A. Greco present with interpreter - motion to reduce bail/ - bail is reduced to \$25,000 surety bail - case set for trial on Oct. 10, 1973.
10-10-73	Before Costantino J - Case called - deft FLORES & counsel Mr. Greco present - trial adjd to Oct. 15, 1973.
10-11-73	Affidavit of JOHN DANIOCEK filed.
10-12-73	Before COSTANTINO J - Case called - deft Humberto Flores & counsel A. Greco present - Hearing held on motion to dismiss the Indictment under Rule 5 - Hearing concluded - Decision Reserved - Trial set for Oct. 15, 1973 at 10:00 am.
10/15/73	Before COSTANTINO, J. - Case called - Deft and atty present - Case adjd to 10/16/73 for trial (FLORES)
10/15/73	By COSTANTINO, J. - Memorandum and Order filed denying deft Flores's motion to dismiss the indictment.
10/16/73	Govt's requests to Charge filed (Flores)
10-16-73	Before COSTANTINO J - Case called - deft/ & attorney Humberto Flores - present - Eulalia Greenberg & Daisy Santos) Jury selected and sworn - Trial ordered and BEGUN - Trial continued to Oct. 17, 1973.
10-17-73	Before COSTANTINO J - Case called - deft & atty A. Greco present with interpreter - Trial resumed - Trial continued to Oct. 18, 1973.
10/18/73	Before COSTANTINO, J. - Case called - Trial resumed - Deft and his atty present with the interpreter D. Santos - Trial cont'd to 10/19/73.
10/23/73	Stenographers Transcript dated 10/17/73 and 10/18/73 filed
10/23/73	Voucher for expert services filed
10/19/73	Before COSTANTINO, J. - Case called - Deft and counsel present - Trial resumed - Order of sustenance signed - Jury returns and renders a verdict of guilt on counts 1 and 2 - Jury polled - Jury discharged - Trial concluded - Sentence adjd without date: Bail contd in sum of \$25,000.00 (FLORES)
10/19/73	By COSTANTINO, J. - Order of sustenance filed
10/24/73	Voucher for expert services filed
10-25-73	Stenographers transcript filed dated Oct. 19, 1973.
11-13-73	Stenographers transcript filed dated Oct. 12, 1973.
1/23/73	Voucher for expert services filed
1-30-73	Voucher for Expert Services filed (HUMBERTO FLORES)

73 CR 602
CRIMINAL DOCKET

DATE	PROCEEDINGS
	FLORES
2-8-74	Before COSTANTINO J - case called - deft/& atty A.Greco present. Interpreter Emil Rodríguez present and sworn - deft sentenced to imprisonment for a period of 8 years on count 1 and 8 years on count 2 to run concurrently pursuant to 18:4208(a)(2) plus special parole term of 5 years.
2-8-74	Judgment & Commitment filed - certified copies to Marshal.
2-8-74	Notice of Appeal filed (no fee) HUMBERTO FLORES.
2-8-74	Docket entries and duplicate of Notice of Appeal mailed to C of A
2-11-74	Voucher for compensation of counsel filed (FLORES)
2-11-74	Copy of Judgment & Commitment retd and filed - deft Flores del. to Federal Detention Headquarters.
3-6-74	Order received from Court of Appeals and filed that record be docketed on or before March 8, 1974 (FLORES)
3-8-74	Record on appeal certified and mailed to Court of Appeals (FLORES)
3-11-74	Acknowledgment received from the C of A for receipt of Record on Appeal (Flores)
4-18-74	Stenographers Transcript dated 2-8-74 filed
4-18-74	Supplemental record on appeal certified and handed to Joan Gill for delivery to Court of appeals (FLORES) (note that some of the docu- ments in this record are filed papers in case 72 CR 1152)
4-22-74	Acknowledgment received from the C of A filed for receipt of supplemental index to Record (Humberto Flores)
5-30-74	Voucher for compensation of Expert Services filed (Flores) Michael Capozzi, reporter.
9-6-74	Opinion and certified copy of Judgment received from court of appeals and filed reversing the judgment of the district court and remanding case back to district court for further proceeding in accordance with opinion (JN)
9-9-74	By COSTANTINO J - Order filed that the deft Humberto Flores be brought by the U.S. Marshal from his present place of incarceration at the Federal Correctional Inst., Lewisburg, Pa. to the U.S. District Court for the Eastern District of NY on or before 9-16-74 for proceedings consistent with the opinion of the Court of Appeals. Copies to US Marshal.
9-12-74	Stenographers Transcript dated 6-28-73 filed
9-13-74	Notice of motion for an order releasing deft FLORES on his O.R., etc. filed ret. 9-23-74 at 10:00 A.M.

DATE	PROCEEDINGS
9-23-74	Before Costantino J -Case called - deft Flores & atty Wm.Epstein of Legal Aid present - motion releasing deft on O.R. argued and denied - set down for hearing on October 1, 1974.
9-23-74	Notice of Appeal filed (deft Flores-from den'al bail application)
9-23-74	Docket entries and duplicate of Notice mailed to C of A
9-23-74	Stenographers Transcript dated 9-23-74 filed
9-25-74	Petition for Writ of Habeas Corpus Ad Testificandum filed (Rolando Sanchez)
9-25-74	By Judd, J - Writ Issued, ret. 9-30-74 (Sanchez_)
9/27/74	Govt's Memorandum of Law filed.
9-30-74	Record retd from C of A - acknowledgment mailed (Flores)
10-1-74	Writ retd and filed- ^{not} executed
10-1-74	Before COSTANTINO J - case called - deft Flores & atty Wm. Epstein of Legal Aid present with interpreter Emil Rodriguez - Herring ordered and begun- hearing contd to Oct. 2, 1974 @ 9:30 am.
10-2-74	Govts Memorandum of Law filed (Flores)
10-2-74	Defts Memorandum of Law filed (Flores)
10-2-74	Before COSTANTINO J - case called - deft Flores & atty Wm.Epstein of Legal Aid present - E.Rodriguez - interpreter present - hearing resumed on remand - both sides rest - motion to dismiss is denied - motion to appeal in forma pauperis is granted - bail set at \$25,000 surety bond - hearing concluded.
10-2-74	Notice of Appeal filed from denial to dismiss etc (Flores)
10-2-74	Docket entries and duplicate of Notice mailed to C of A (Flores)
10/8/74	Stenographers Transcripts dated 10/1/74 and 10/2/74 filed
1008-74	By COSTANTINO J - Memorandum and Order filed -Findings of fact given in the court's bench decision of Oct. 2, 1974, are incorporated in this Memorandum and Order. For the reasons outlined in that decision the court denies deft Flores' motion to dismiss.
10/9/74	Voucher for expert services filed (FLORES) transcripts etc.
10-11-74	Voucher for Expert Services(Flores) filed & proceedings re bail motion)

EJB:RLC:mc
F.#733,310

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

73 CR 602

----- X
UNITED STATES OF AMERICA

INDICTMENT

- against -
HUMBERTO FLORES, CARLOS
HIDALGO and MIGUEL VERA,

Crim. No.
(T. 21, U.S.C., §952(a),
§959(1)(2), §960(a)(1)(3),
and §963; T. 18, U.S.C.,
§2)

Defendant.

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

JUN 19 1973

----- X
THE GRAND JURY CHARGES:

TIME AM
COUNT ONE

On or about the 25th day of February 1972,
at Guayaquil, Ecuador, the defendant CARLOS HIDALGO
did knowingly and intentionally distribute approximately
2.8 kilograms of cocaine hydrochloride, a Schedule II
narcotic drug controlled substance, at the time intending
that such cocaine hydrochloride would be unlawfully
imported into the United States. (Title 21, United States
Code, Section 959(1) and Section 960(a)(3))

ONE

COUNT TWO

15 Count

On or about the 28th day of September 1972,
within the Eastern District of New York, the defendant
HUMBERTO FLORES and the defendant MIGUEL VERA did knowingly
and intentionally import into the United States from
Santiago, Chile, approximately 2.2 kilograms of cocaine
hydrochloride, a Schedule II narcotic drug controlled
substance. (Title 21, United States Code, Section 952(a)
and Section 960(a)(1); Title 18, United States Code,
Section 2)

COUNT THREE

On or about the 28th day of September 1972, at
Santiago, Chile, the defendant MIGUEL VERA did knowingly and
intentionally distribute approximately 2.2 kilograms of
cocaine hydrochloride, a Schedule II narcotic drug
controlled substance, at the time knowing that such cocaine

hydrochloride would be unlawfully imported into the United States. (Title 21, United States Code, Section 959(2) and Section 960(a)(3))

TWO

~~COUNT FOUR~~

2d Count

On or about and between the 1st day of September 1971 and the day of the filing of this indictment, both dates being approximate, within the Eastern District of New York and elsewhere, the defendant HUMBERTO FLORES, the defendant CARLOS HIDALGO and the defendant MIGUEL VERA did combine, conspire and confederate among themselves and together with other persons, to commit offenses in violation of Title 21, United States Code, Section 952(a) by conspiring to knowingly and intentionally import into the United States from Ecuador and Chile and other places outside the United States, quantities of cocaine hydrochloride, a Schedule II narcotic drug controlled substance.

In furtherance of said conspiracy and toward the accomplishment of the objectives thereof, the defendants committed various overt acts including but not limited to the following:

O V E R T A C T S

1. On or about February 13, 1972, the defendant CARLOS HIDALGO traveled from John F. Kennedy International Airport, Queens, New York, within the Eastern District of New York, to Guayaquil, Ecuador.
2. On or about September 28, 1972 at Santiago, Chile, the defendant MIGUEL VERA went to the Valparaiso Hotel Santiago, Chile.
3. On or about September 28, 1972, the defendant HUMBERTO FLORES went to the International Arrivals Building

-3-

at John F. Kennedy International Airport, Queens, New York,
within the Eastern District of New York. (Title 21, United
States Code, Section 963)

A TRUE BILL.

Robert R. Keane
FOREMAN

Robert A. Morse, Jr.
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

TlPM 1
Rl-1
10/2 2

A F T E R N O O N S E S S I O N

THE COURT: The Court at this time is ready to pronounce its determination and opinion in the hearing held with reference to the remand by the Second Circuit Court of Appeals.

This case was remanded to this Court by the Court of Appeals with an instruction that a hearing be held to determine whether the defendant was a fugitive during the period June 19th to June 28th, 1973.

At the hearing, several defense witnesses testified that they saw defendant at his place of employment, a luncheonette, during the period in question. The Court found particularly persuasive the testimony of a young woman, now a teacher's aide, who was during the period in question defendant's co-worker at the luncheonette.

Her recollection was that the defendant continued to work at the luncheonette during the period.

There was no evidence contradicting the defense witnesses' recollections as to defendants' presence at his place of employment. The Government's witness, who arrested defendant at his home on June 27th, 1973, was during this period with the Drug Enforcement Section of the Department of Customs. He

conceded that he knew of no attempts to arrest defendant at the luncheonette during the nine days. Indeed, he knew of no attempts by any agent to ascertain during the hours that the luncheonette was open for business whether defendant was present at his place of business.

Moreover, he testified that neither he nor to his knowledge any other agent ever knocked on the door of defendant's home prior to June 27th, during the period to see if the defendant was at home. Certainly, the Government agents failed to exercise reasonable diligence in attempting to arrest defendant during this period.

On the basis of the foregoing evidence, this Court find that defendant was not a fugitive during the period in question.

But this finding is not dispositive of the case. The remand was made, in substance, to allow this Court to determine whether the indictment must be dismissed pursuant to Rule 4 of the Plan for the United States District Court for the Eastern District of New York for achieving prompt disposition of criminal cases.

A contention first raised at this time is dispositive of the Rule 4 question. This contention is

3 1 that the Government complied with Rule 4 by reason
2 of the Assistant United States Attorney's oral state-
3 ment of readiness at defendant's June 28, arraignment.

4 The contention is supported by documents which
5 apparently were not before the Court of Appeals. These
6 documents are the minutes of defendant's June 28th,
7 1973, arraignment and the March 20th, 1973 memoran-
8 dum to all the judges of the Eastern District from
9 Jacob Mishler, Chief Judge of the Eastern District
10 of New York. Chief Judge Mishler's memorandum, written
11 in response to the United States Attorney's request
12 for guidance, clearly indicates that the Rule 4 state-
13 ment need be in no particular form.

14 Chief Judge Mishler expressed his view that a
15 statement to the Court at the time of pleading in the
16 presence of defendant complied with the rule. Indeed,
17 he considered it preferable to a form notice of readi-
18 ness.

19 In the instant case, the Government complied
20 with the rule by apprising the Court of its readiness
21 to try the defendant:

22 "Mr. Clarey: Your Honor, I will represent that
23 the Government is ready to try Umberto Flores immedi-
24 ately, although there are two fugitives in the case."

25 (Minutes, June 28th, 1973, page six.)

Chief Judge Mishler's interpretation of Rule 4 conforms with that stated in the United States versus Pierro, 478 F.2d 386, 389 (2nd Cir. 1973) where it was held that "under Rule 4 the Government must communicate its readiness for trial in some fashion within the six months."

The test is whether the Government "proceeded in good faith . . . and that the defendant has suffered no prejudice as a result of his failure to be informed of the Government's readiness for trial."

(478 F.2d at 386.)

Here, there is no evidence of bad faith on the Government's part. Since defendant and his attorney were apprised at the arraignment of the Government's readiness for trial, the concern that defendant not be prejudiced by failure to provide notice is not applicable here.

A plain reading of Rule 4 indicates that a writing is not required. The rule is silent on the manner in which the Government is to inform the Court when it is ready for trial. In view of the "compelling public interest in criminal prosecutions," United States v. Pierro, 478 F.2d at 389, dismissal of the indictment would be improper under the circumstances presented here.

5 1 Defendant contends that under the doctrine of
2 law of the case this Court may not consider the ques-
3 tion of the efficacy of the June 28th, oral notice.

4 The rule is that a lower Court on remand may
5 consider and decide any matters left open by the man-
6 date of the Court, *Sprague v. Ticonic National Bank*,
7 307 U.S. 161, 167-69 (1939); *re C and A Potts and*
8 *Company*, 166 U.S. 263 (1896); *Banco Nacional de Cuba*
9 *v. Farr*, 383 F.2d 166, 177 (2nd Cir. 1967), cert.
10 denied, 390 U.S. 956 (1968).

11 Since the Court of Appeals did not consider
12 the issue of the validity of the oral statement of
13 readiness, this Court may now decide the issue.

14 For the reasons outlined above, this Court
15 finds the Government complied with both the letter of
16 and the policy underlying Rule 4.

17 Accordingly, this Court holds that the indict-
18 ment should not be dismissed.

19 MR. EPSTEIN: Of course, your Honor, we dis-
20 agree with your judgement and intend to appeal.

21 As a matter of fact, I would say that I have
22 prepared in anticipation of your Honor's decision a
23 notice of appeal which I would first request leave
24 to appeal in forma pauperis.

25 THE COURT: Yes.

Certificate of Service

October 29, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

William Epstein